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CROSS-EXAMINATION IN INTERNATIONAL ARBITRATION

By
Jonathan R. Vaitl*

I. INTRODUCTION

Cross-examination in International Arbitration is written by Kaj Hobér and Howard S. Sussman.¹ The authors sought to provide lawyers with a fundamental understanding of the basic principles of cross-examination in international arbitration. The authors begin by distinguishing cross-examination in international arbitration from cross-examination in domestic arbitrations and trials. Thereafter, the authors explore nine basic principles of cross-examination that lawyers can build upon through experience.² Although the authors explain the nine basic principles in detail, they also illustrate the principles with actual and hypothetical cross-examination exchanges.³ The authors note that the examples are not meant to illustrate a perfect cross-examination, but to offer “insights and clues into what works, what doesn’t, and why.”⁴ Ultimately, cross-examination is a circumstantial skill – not a script to follow at all times, but a skill developed and dependent on the particular facts and circumstances of a case.⁵ The authors provide a starting point and a way of thinking about cross-examination from a strategic point of view.⁶

The book is a useful guide for practicing attorneys or even law students who desire to learn more about cross-examination, both generally and in the context of international arbitration. The examples, both real and hypothetical, effectively contextualize the principles and allow readers to visualize themselves in the role of the cross-examiner, which is itself a valuable practice. The authors walk readers through each

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¹ KAJ HOBÉR & HOWARD S. SUSSMAN, *CROSS-EXAMINATION IN INTERNATIONAL ARBITRATION* (2014). Kaj Hobér is on the Board of Directors of the American Arbitration Association and is a former professor of East European Commercial Law at the University of Uppsala. He is currently an associate member of 3 Verulam Buildings, a preeminent commercial set of barristers’ chambers in London. In addition, Mr. Hobér was published in the 2015 volume of the *Yearbook on Arbitration & Mediation* and participated as an arbitration panelist in the 2015 *Yearbook* symposium entitled “What’s Left of the Law in the Wake of ADR?” See Kaj Hobér, *Investment Treaty Arbitration and Its Future – If Any*, 7 Y.B. ON ARB. & MEDIATION 58 (2015). Howard S. Sussman is Of Counsel at Wrobel, Schatz & Fox in New York City. He previously was a Visiting Scholar in Residence at the University of Stockholm and an Associate Professor of Law at the University of Houston.

² HOBÉR & SUSSMAN, *supra* note 1, at v.

³ *Id.* at 4.

⁴ *Id.*

⁵ *Id.* at 155.

⁶ *Id.*

phase of a cross-examination, beginning with how to prepare and develop a theory of the case, how to ask relevant questions, and how to maintain control of the witness. By providing advice about developing a theory of the case, and even devoting a chapter to the importance of maintaining self-control, the authors do more than just discuss cross-examination; they provide advice for being an effective lawyer. At times, the book becomes repetitive, certain subsections appear to have little relation to the chapter in which they appear, and some of the separated principles – for instance, using leading questions and asking simple questions – could have been collapsed into a single principle to avoid redundancy. However, the book does not fail because of these flaws, as I perceive them. The authors still pack a significant amount of useful advice into a short book, making it well worth the read.

II. OVERVIEW

Cross-examination in International Arbitration is divided into three parts addressing three fundamental themes: international arbitration is distinct from traditional litigation in common law or civil law countries; cross-examination, at its core, is based on controlling the witness; and cross-examination elicits facts to support the attorney's closing argument.⁷ The book offers a short guide, at only 156 pages, and focuses most of the attention on the second theme, control of the witness.

Part One addresses the first theme – a description of arbitration and its differences from litigation – in five chapters. Chapter One provides a brief introduction that sets down the rationale for the book, namely, that the attorney's goal is to win the case for his or her client, and cross-examination is merely a tool for achieving that goal.⁸ Chapter Two aims to describe the legal nature of international arbitration, including the doctrine of separability, *compétence de la compétence*,⁹ and arbitral awards and their enforceability.¹⁰ Beginning with Chapter Three, the authors describe the stages of a typical arbitral proceeding and the types of permissible evidence.¹¹ Chapter Four addresses general considerations for cross-examination in international arbitration, including the multiculturalism inherent to international arbitration.¹² Finally in Chapter

⁷ HOBÉR & SUSSMAN, *supra* note 1, at 155-56.

⁸ *Id.* 4.

⁹ Although Hobér and Sussman use the phrase “*compétence de la compétence*,” as it is known in France, the concept does not differ from the German *kompetenz-kompetenz*, which is the more commonly used form. See Natasha Wyss, Comment, *First Options of Chicago, Inc. v. Kaplan: A Perilous Approach to Kompetenz-Kompetenz*, 72 TULANE L. REV. 352, 352 (1997).

¹⁰ HOBÉR & SUSSMAN, *supra* note 1, at 6-13.

¹¹ *Id.* at 14-28.

¹² HOBÉR & SUSSMAN, *supra* note 1, at 29-31.

Five, the authors preview the fundamentals of cross-examination that they explore more fully in Part Two.¹³

Part Two lays out the nine basic principles of cross-examination in international arbitration. Chapter Six advises attorneys to be fully prepared to cross-examine a witness, which starts with attorneys knowing exactly what they want from the witness.¹⁴ In Chapter Seven, the authors explain the importance of brevity and keeping cross-examination to a maximum of three points.¹⁵ Chapter Eight highlights the value of leading questions,¹⁶ and Chapter Nine recommends short, clear, and simple questions.¹⁷ In Chapter Ten, the authors exhort readers to listen carefully to a witness's answers to determine a witness's motivation for evading the question.¹⁸ Chapter Eleven cautions attorneys not to ask witnesses to agree with conclusions.¹⁹ In Chapter Twelve, the authors further warn readers not to let witnesses repeat their prior direct testimony,²⁰ and Chapter Thirteen states that the cross-examiner should not let the witness explain an answer because doing so runs the risk of the witness saying something damaging to the attorney's client.²¹ Finally in Chapter Fourteen, the authors counsel readers to maintain self-control in order to maintain control over the witness.²²

Part Three offers the authors' concluding words in which they underscore the value of experience in developing the skill of cross-examination.²³ In this part, the authors identify the three underlying themes to the book.²⁴

¹³ *Id.* at 32-45.

¹⁴ *Id.* at 49-65.

¹⁵ *Id.* at 66-77.

¹⁶ *Id.* at 78-86.

¹⁷ HOBÉR & SUSSMAN, *supra* note 1, at 87-103.

¹⁸ *Id.* at 104-14.

¹⁹ *Id.* at 115-25.

²⁰ *Id.* at 126-36.

²¹ *Id.* at 137-45.

²² HOBÉR & SUSSMAN, *supra* note 1, at 146-52.

²³ *Id.* at 155.

²⁴ *Id.* at 155-56.

III. PART I – BACKGROUND

A. *The Law Surrounding International Arbitration*

The authors start Part One by discussing the law of international arbitration. Arbitration is a means of resolving disputes between contracting parties who, through their contract, consented to the use of arbitration as an alternative to a judicial proceeding.²⁵ The consensual nature of arbitration distinguishes it from judicial proceedings, but like a judicial trial, the arbitral proceeding exists because of, and will depend on, the law of the nation in which the arbitration takes place.²⁶ However, the parties retain significant control over how the arbitration will proceed, including the manner of handling evidence and the ability of parties to amend current claims or introduce new claims.²⁷ In this sense, the arbitration agreement between the parties, more than the national law where the arbitration takes place, governs the proceeding and grants authority to the arbitrators to hear the dispute.²⁸ The arbitration agreement, then, also serves as a bar to resolving the dispute through litigation unless certain exceptions apply.²⁹

Two key, interrelated doctrines serve as cornerstones of international arbitration: the doctrine of separability and *compétence de la compétence*.³⁰ Under the doctrine of separability, an arbitral clause stands as its own, independent contract, and a party who can invalidate the main agreement has not necessarily invalidated the arbitral clause.³¹

²⁵ HOBÉR & SUSSMAN, *supra* note 1, at 6.

²⁶ *Id.* at 7.

²⁷ *Id.*

²⁸ *Id.* at 7.

²⁹ *Id.* at 8-9. One exception is if the subject matter of the arbitration is not arbitrable under the pertinent national law. The agreement also will not bar litigation if one of the parties has waived the arbitration agreement, for example, by not objecting to the other party pursuing its claim in court, or if the agreement itself is not valid as a contract. A final exception concerns the validity of the arbitration agreement under contract law. A contractually invalid agreement will not prevent one of the parties from seeking resolution through the courts. *Id.*

³⁰ Janet A. Rosen, Note, *Arbitration Under Private International Law: The Doctrines of Separability and Competence de la Competence*, 17 FORDHAM INT'L L.J. 599, 609 (1994).

The *competence de la competence doctrine* is considered a corollary to the separability doctrine. The separability doctrine, which espouses the autonomy of the arbitration agreement, creates a need for the arbitral tribunal to have the jurisdictional competence to rule not only on the main contract's validity but also on the validity of the arbitration agreement. Under this analysis, the competence of the arbitral tribunal to rule on jurisdictional challenges is a corollary to the doctrine of separability establishing the autonomous nature of the arbitration agreement.

Id.

³¹ HOBÉR & SUSSMAN, *supra* note 1, at 9. The authors note that the doctrine of separability is crucial to

The principle of *compétence de la compétence* authorizes arbitrators to determine the validity of an arbitration agreement and to determine whether the tribunal has jurisdiction to hear the dispute.³² The authors point out that, although arbitration decisions in most jurisdictions are binding and final, certain countries allow parties to challenge decisions regarding the arbitrators' jurisdiction.³³

When a tribunal determines the validity of an arbitration agreement and their own jurisdiction, the arbitration proceedings may commence, and the arbitrators will render an award that is presumed to be final and binding unless the parties state otherwise in the agreement.³⁴ An unsatisfied party, however, may challenge the award in court, albeit on procedural grounds and not on the merits.³⁵ In some cases, parties can even seek nullification of an award.³⁶ Barring any impediments to an international arbitration award, the award will be enforceable internationally.³⁷

B. How International Arbitration Works

Arbitration generally follows a series of stages, unless the parties dictate otherwise in their agreement.³⁸ First, the party making a claim will initiate arbitration by submitting a written request, which includes the party's appointment of an arbitrator, either to the other party to the agreement or to an arbitration institution.³⁹ The other party will reply to the request for arbitration and appoint its own arbitrator, at which point the

international arbitration because it prevents a party from avoiding arbitration by invalidating the main agreement. The same claims that can invalidate a contract, such as coercion, incapacity, or illegality, can also invalidate an arbitration agreement.

³² *Id.*

³³ *Id.* at 10.

³⁴ *Id.*

³⁵ *Id.* See also Rémy Gerbay, *Is the End Nigh Again? An Empirical Assessment of the "Judicialization" of International Arbitration*, 25 AM. REV. INT'L ARB. 223 (2014) (stating that an apparent increase in the "judicialization" of international arbitration reflects the increasing sophistication and complexity of disputes submitted to international arbitration, as compared to the early days of international arbitration).

³⁶ HOBÉR & SUSSMAN, *supra* note 1, at 11. Nullification requires the party seeking nullification to prove that an arbitration agreement is not valid, the party was not given due notice, the dispute or the arbitrator's decision was not within the scope of the arbitration agreement, or the makeup of the arbitral tribunal did not accord with the agreement. A court can also nullify an award if the court finds that the subject matter of the dispute was not arbitrable or that the award offends public policy.

³⁷ *Id.* at 12.

³⁸ *Id.* at 14. See also Kenneth F. Dunham, *International Arbitration Is Not Your Father's Oldsmobile*, 2005 J. DISP. RESOL. 323, 339-40 (2005) (stating that each arbitration institution will have its own procedural rules, which are available for download on the institutions' websites).

³⁹ HOBÉR & SUSSMAN, *supra* note 1, at 14.

two arbitrators will agree on a third arbitrator to serve as chairperson of the tribunal.⁴⁰ Once the parties have selected the arbitrators, the claimant sets forth the issues in dispute in its “statement of claim,” and the other party submits a “statement of defense” that will also include any counterclaims the party wants to make.⁴¹ Both sides then have the option of making additional replies and addressing procedural issues.⁴² The parties will then participate in a hearing, introducing testimonial and documentary evidence, as well as making their arguments, which may be followed by a post-hearing briefing period.⁴³ At the conclusion of all presentation of evidence and argument, the arbitrators will render their decision as a written award.⁴⁴

The initial statements submitted by the parties generally contain three parts: (1) each party’s prayer for relief, (2) the legal grounds for the claim or defense, and (3) the facts and circumstances supporting each party’s claim or defense.⁴⁵ The prayers for relief precisely set forth what the parties want and serve as boundaries on the arbitrators’ authority to rule;⁴⁶ however, the scope of the arbitration agreement restrains the scope of the parties’ prayers for relief.⁴⁷ The legal grounds will relate to both the specific legal injury, such as a claim of breach of a specific contract provision, as well as the law supporting that claim, such as specific statutes or case law.⁴⁸ The parties must also state the relevant facts with a significant amount of detail so that the arbitrators have a complete picture for making an accurate decision.⁴⁹ If the respondent chooses to make a counterclaim, it will generally raise the counterclaim in its statement of defense, but both parties often have the ability, unless their agreement forbids it, to augment or amend their

⁴⁰ *Id.*

⁴¹ *Id.* at 15.

⁴² *Id.* at 15. Other procedural issues may include “questions relating to jurisdiction, production of documents, amendment of claims or presentations of new claims, and the determination of the applicable law.”

⁴³ *Id.*

⁴⁴ HOBÉR & SUSSMAN, *supra* note 1, at 15-16. The authors point out three ways in which the above procedure differs from traditional civil litigation. First, the proceeding usually does not include a discovery period before the hearing. The authors caution that the lack of discovery period does not mean that the parties do not share a voluminous amount of information, but that it does put the onus on the parties and their counsel to conduct their own investigations and resources in developing their cases. Second, the authors highlight the absence of evidentiary rules in international arbitration. The result is that most evidence will be admitted, “even if the party opposing its admission claims that it is forged or stolen or otherwise inauthentic or tainted.” Finally, the arbitrators are not presumed to know the law the way parties to litigation would assume the court knows the law. *Id.*

⁴⁵ *Id.* at 18.

⁴⁶ *Id.*

⁴⁷ *Id.* at 18.

⁴⁸ *Id.*

⁴⁹ HOBÉR & SUSSMAN, *supra* note 1, at 18.

initial claims.⁵⁰ Not all arbitrations will include post-hearing briefs, stopping instead after the conclusion of closing arguments;⁵¹ however, parties frequently have a final opportunity to present their arguments and facts before the arbitrators make their decision.⁵²

The hearing itself consists of the parties presenting evidence in the form of witness testimony and documents. The way that parties present evidence can vary from one arbitration to another, owing to the parties' ability to control the arbitral proceeding.⁵³ Party autonomy for controlling the arbitration ultimately results in the arbitrators having limited authority to exclude evidence, unless the evidence is "manifestly irrelevant to the dispute or...is not timely presented."⁵⁴ Arbitrators typically have no subpoena power and do not administer oaths.⁵⁵ However, despite their limitations, arbitrators determine how to weigh the evidence presented, and cross-examination can serve as a potent way of achieving the truth in the absence of oaths.⁵⁶ Arbitrators rely on their right to allocate weight to the evidence presented by the parties as a justification for admitting potential hearsay evidence or even evidence claimed to be "forged or stolen or otherwise inauthentic or tainted."⁵⁷ In addition, the relevance of evidence is often unknown until the parties have presented all their evidence, resulting in the arbitrators favoring admissibility over exclusion.⁵⁸ The hearing will typically involve testimony from fact witnesses, expert witnesses, or both.⁵⁹ Typically, in international arbitration the witnesses will testify through written statements, rather than oral testimony.⁶⁰

⁵⁰ *Id.* at 19.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 20.

⁵⁴ HOBÉR & SUSSMAN, *supra* note 1, at 20.

⁵⁵ *Id.* at 20-21 Despite the arbitrators' lack of subpoena power, parties generally produce whatever documents they are ordered to produce. *Id.* By contrast, under U.S. federal law, arbitrators do have subpoena power. 9 U.S.C. § 7 (2016); *see also* THOMAS E. CARBONNEAU, *ARBITRATION IN A NUTSHELL* 91-92 (3d ed. 2012).

⁵⁶ HOBÉR & SUSSMAN, *supra* note 1, at 21.

⁵⁷ *Id.* at 22.

⁵⁸ *Id.* at 23.

⁵⁹ *Id.* at 26. Fact witnesses "are expected to provide facts, not to set out arguments about what those facts mean. Arbitrators, as a rule, do not take kindly to witnesses who try to plead the case of the party that called them." *Id.* By contract, expert witnesses "do not testify about the facts of the dispute but rather about the significance, in the expert's field of expertise, of facts the expert deems relevant to the dispute." *Id.*

⁶⁰ HOBÉR & SUSSMAN, *supra* note 1, at 26-27. Written statements will usually be prepared by counsel and allow the arbitration to proceed more efficiently because the statements will alleviate the need for much, if any, oral testimony, which is often limited to cross-examination. The arbitrators, in addition to counsel, may ask questions of the witnesses. *Id.*

C. The Role of Cross-Examination in International Arbitration

In an arbitration, the arbitrators serve as both judge and jury.⁶¹ More importantly, unlike domestic trials, the arbitrators may be from different nations among themselves and among counsel, adding a multicultural aspect not as common outside of international arbitration.⁶² The multiculturalism introduces not only the possibility of arbitrators who speak different languages natively, but also arbitrators who come from different legal traditions.⁶³ Counsel must ensure that the cross-examination is “succinct and efficient” because the arbitrators will likely come from varied backgrounds, have significant experience, and will probably be accomplished lawyers in their own right.⁶⁴

The authors identified nine principles, fully discussed below, to effective cross-examination that seek that “succinct and efficient” goal. The authors describe the rationale of cross-examination as reducing “to the extent reasonably possible, the adverse impact of the witness’s direct testimony on your client’s case.”⁶⁵ With this purpose in mind, counsel should consider whether to cross-examine, whether the direct testimony was sufficiently damaging, and whether cross-examination is likely to mend the damage without making it worse.⁶⁶ The nine principles discussed below will guide the attorney in making that decision and, if he chooses to cross-examine, in conducting a succinct, effective cross-examination.

IV. PART II – THE NINE BASIC PRINCIPLES

A. Basic Principle One: Be Fully Prepared

Good cross-examination begins with a well-prepared attorney.⁶⁷ The authors define full preparation as having a thorough knowledge of the facts, a mastery of the law,

⁶¹ *Id.* at 29.

⁶² *Id.*

⁶³ *Id.* at 30. The authors also note:

The absence of national rules of evidence also means that some conduct which is customary, or even obligatory, under some national systems has no place in international arbitration. As an example, the practice of ‘putting’ a contention to a witness need not be used in international arbitrations, and its use can often be counter-productive because one or more of the arbitrators may find it uncongenial or offensive or time-wasting.

Id.

⁶⁴ *Id.* at 31.

⁶⁵ HOBÉR & SUSSMAN, *supra* note 1, at 32.

⁶⁶ *Id.* at 33.

⁶⁷ HOBÉR & SUSSMAN, *supra* note 1, at 49.

and a plan for each witness the attorney intends to question.⁶⁸ Good preparation, though, goes back further to the attorney's theory of his client's case.⁶⁹ The authors write that the attorney's theory of the case should direct everything the attorney does during the arbitration.⁷⁰ Practically, the authors recommend drafting a closing argument early and "working backwards" to figure out how to achieve the objective of persuading the arbitrators to accept the attorney's theory of the case.⁷¹ An attorney should only proceed with cross-examination if it is necessary to support the attorney's theory of the case.⁷² Keeping in mind the role of cross-examination as a tool to elicit the framework of the theory of the case and the risks involved in questioning the witness, the authors state, "the first rule of cross-examination: Don't."⁷³ If the attorney can glean the same evidentiary support from other methods, such as exhibits to written witness statements, then the attorney should avoid cross-examination.⁷⁴

If the attorney decides to cross-examine the witness, the attorney must consider each witness as just "one piece of the jigsaw puzzle," ask the right questions, and only ask as many questions as are necessary to achieve the attorney's objective for that witness.⁷⁵ The general rule for asking the right question is to know the answer before asking the question.⁷⁶ The authors also suggest deciding on a safe final question for the witness, then a safe initial question, which provides the attorney with a framework for the cross-examination.⁷⁷ The sequence of the middle questions can follow a chronological timeline, but the authors believe that the chronological approach is a mistake in commercial disputes, which occupies most of international arbitration.⁷⁸ The parties will

⁶⁸ *Id.* at 49-50.

⁶⁹ *Id.* at 50. Hobér illustrates this principle with the "successful gambit" of defense attorney Johnny Cochran in his representation of O.J. Simpson: "'If the glove don't fit you must acquit.' The glove referred to was a blood-soaked glove that was found at the murder scene but was too small for Simpson's hand and thus showed his non-involvement – which was the defence's [sic] theory of the case." *Id.*

⁷⁰ *Id.* (stating that the closing argument is the best time to convince the arbitrators of the attorney's theory of the case).

⁷¹ *Id.* at 50-51 (stating that a closing argument should do three things: explain the theory of the case, persuade the arbitrators toward the attorney's theory, and dissuade the arbitrators from siding with the opponent's theory).

⁷² HOBÉR & SUSSMAN, *supra* note 1, at 51.

⁷³ *Id.* at 52.

⁷⁴ *Id.* at 51.

⁷⁵ HOBÉR & SUSSMAN, *supra* note 1, at 53.

⁷⁶ *Id.* at 55 (stating two rationales for the general rule: (1) "an unexpected answer may well destroy your plan for the cross-examination" and (2) "cross-examination is not the place to find out further facts about the case").

⁷⁷ *Id.* at 55.

⁷⁸ *Id.* at 60.

have already covered the chronology of events in their written statements, making this approach redundant and a waste of time.⁷⁹ Instead, the authors recommend a thematic approach and organizing questions logically within each theme.⁸⁰ The authors also suggest a “decision tree,” which identifies alternative answers to each question and prepares follow-up questions.⁸¹

B. Basic Principle Two: Be Brief

In keeping with the idea that each witness is only a piece to a larger jigsaw puzzle, the authors recommend making a maximum of three main points per cross-examination.⁸² The main points to make depend on the attorney’s theory of the case.⁸³ The authors suggest four reasons for keeping cross-examinations short:

[T]he longer the time you spend on cross-examination, the greater the risk that things will go wrong – that is, that the witness will say things that will hurt your client’s case. A second reason is that a brief, succinct, and focused cross-examination has a much better chance of persuading the arbitrators of the point or points you are trying to make. A third reason is that in international arbitration the arbitrators are usually quite familiar with the relevant facts of the dispute. This means that there is a serious risk that the arbitrators will lose interest in a cross-examination which is unfocused and long-winded. Yet a fourth reason is the risk that the arbitrators will think you are wasting their time, and as a result will not only lose interest but also become irritated at you, which will disadvantage your client.⁸⁴

The authors reiterate here that attorneys should only cross-examine a witness if they need to and should not allow their clients to push additional questioning.⁸⁵

⁷⁹ *Id.*

⁸⁰ HOBÉR & SUSSMAN, *supra* note 1, at 60.

⁸¹ *Id.* at 64 (stating, for example, “if the initial inquiry is ‘You did not sign the contract, did you?’ there would be four main branches for each of ‘no,’ ‘do not recall signing,’ ‘not sure,’ and ‘yes I did,’ with subsidiary branches descending from those main branches”). *See also* DAVID E. ROBBINS, SECURITIES ARBITRATION PROCEDURE MANUAL § 12-22 (5th ed. 2014) (suggesting a chart of subjects with introductory questions for each section).

⁸² HOBÉR & SUSSMAN, *supra* note 1, at 66.

⁸³ *Id.*

⁸⁴ HOBÉR & SUSSMAN, *supra* note 1, at 67.

⁸⁵ *Id.* at 70.

With respect to experts, attorneys must be careful in cross-examination not to attack the expert witness on the expert's field of expertise because the attorneys, in most cases, will not have sufficient knowledge to do so effectively, even with the education provided by the attorneys' own experts.⁸⁶ Instead, the authors suggest several lines of questioning: (1) the expert's qualification to provide an opinion, (2) the factual basis informing the expert's opinion and whether additional or different facts would change the expert's testimony, (3) the intellectual basis of the expert's opinion, (4) whether the expert's testimony is consistent with the standards or opinions of other experts in the same or a similar field, and (5) personal characteristics that call the expert's credibility into question.⁸⁷

C. Basic Principle Three: Use Only Leading Questions

A leading question "expressly or implicitly suggests the answer sought."⁸⁸ Leading questions make sense in the context of cross-examination because leading questions do not elicit new information, which comports with the goal that the attorney will rarely use cross-examination to acquire new facts. Instead, leading questions ask a witness to agree or disagree with what the authors describe as a "short, simple, unambiguous statement of a single, simple fact."⁸⁹ The authors caution that the attorney needs to be fully prepared and know what the witness's truthful answer will be.⁹⁰ In practice, a proper leading question will evoke either a yes or no answer and not encourage the witness to expound on his or her own narrative.⁹¹

D. Basic Principle Four: Use Only Short, Simple, Unambiguous Questions

In addition to brevity, discussed in Subsection B above, a good cross-examination will be simple.⁹² Clear, short, and simple questions will enable the attorney to exercise

⁸⁶ *Id.* at 72-73 (although the expert witness section appears in the "be brief" chapter, the content of the section bears little relevance to brevity and, in fact, includes a lengthy cross-examination excerpt as an illustration).

⁸⁷ *Id.* at 73.

⁸⁸ *Id.* at 78.

⁸⁹ HOBÉR & SUSSMAN, *supra* note 1, at 79.

⁹⁰ HOBÉR & SUSSMAN, *supra* note 1, at 79.

⁹¹ *Id.* The authors naturally talk about the need to keep witnesses to yes or no answers that prevent witnesses from telling stories. *Id.* That is also the basic thrust of Principle No. 4, using short, simple, unambiguous questions. The two principles seem, to me, sufficiently related, and instead they could be one cohesive principle. In fact, they seem more like two parts of an overall principle regarding the form of the questions an attorney should ask. Teasing them out into two separate principles seems unnecessary to me and adds to the feeling of redundancy throughout the book.

⁹² *Id.* at 87.

better control over the witness and will make it more difficult for the witness to answer evasively.⁹³ The authors offer as a rule of thumb that a question should be, at most, twenty-five words and should address only a single fact.⁹⁴

Lack of simplicity creates a myriad of potential problems during cross-examination:

The witness may not understand the question and may ask you to repeat it. The witness may take part of the question and use it to launch into a speech about something you don't want to hear or have the arbitrators hear. The witness may try to draw you into a debate about the meaning of your question. Any of these things may cause you to lose control of the witness and of the cross-examination. If the witness uses the poorly worded question as a platform from which to launch into a speech, even worse things may happen.⁹⁵

Accordingly, the authors advise against compound questions that pile question upon question and suggest sticking to simple, single-fact questions that are easy to understand.⁹⁶ Simplicity also means stripping questions of unnecessary words, such as adjectives or imprecise language.⁹⁷

E. Basic Principle Five: Listen to the Answer

Effective cross-examination is not just asking the right questions in the right way but also carefully listening to the witness's answer and understanding "the meaning and significance of what the witness says."⁹⁸ Close listening serves two purposes: (1) ensuring that the witness actually answered the question and (2) determining if the answer requires a change of course in the direction of the cross-examination.⁹⁹

⁹³ *Id.*

⁹⁴ *Id.* at 87-88. The authors also recommend using the witness's surname to "remind the witness that the arbitrators are focused on the witness as an individual with a reputation and position to protect and are not just engaged in an abstract intellectual enterprise." *Id.* See also Gary S. Gildin, *Cross-Examination at Trial: Strategies for the Deposition*, 35 AM. J. TRIAL ADVOC. 471, 494 (2012): "Asking a leading question alone will not prevent the witness from launching a narrative that revisits the direct examination. During cross-examination, counsel must abide by a second tenet regarding the form of the question – each leading question should pose only one additional fact to be admitted or denied."

⁹⁵ Hobér & Sussman, *supra* note 1, at 89.

⁹⁶ HOBÉR & SUSSMAN, *supra* note 1, at 91.

⁹⁷ *Id.* (stating, as an example, a comparison between "[Question]: The ring cost \$50,000, didn't it?" and "[Question]: The ring was very expensive, wasn't it?").

⁹⁸ *Id.* at 104.

⁹⁹ *Id.* at 104.

The authors identify four categories of answers: (1) a simple “yes,” (2) something more than a “yes,” (3) an honest witness who does not answer, and (4) a “witness with an agenda” who fails to answer.¹⁰⁰ The first category, while seeming to be exactly what the attorney would want, still demands a close ear because the manner in which the witness gave the simple “yes” answer can be revealing.¹⁰¹ The second category triggers the same analysis as the first category.¹⁰²

The “failure to answer” categories lead to an even more complex analysis of the witness and his or her motivations. As the authors point out, “Your understanding of why the witness did not answer will also provide some idea of what dangers may be encountered as the examination proceeds.”¹⁰³ If the attorney thinks that the witness was being honest but just did not answer the question, then the answer would fall into the third category. In that case, the witness “will usually work with you to get an answer to the question and so you could proceed on the assumption that the witness is willing to do that.”¹⁰⁴ A good test is to restate the question. If the witness answers it properly, then the attorney’s impression was accurate; however, if the witness still fails to answer the question, then the attorney can be “reasonably confident . . . that the witness is not willing to be cooperative, and that the approach to the witness should therefore be changed.”¹⁰⁵ An evasive, uncooperative witness, giving an answer falling into category four, can still support the overarching aim of the cross-examiner, though, because the arbitrators will observe the repeated evasions and may use that as a basis for discrediting the witness.¹⁰⁶

F. Basic Principle Six: Do Not Ask for Conclusions

Ultimately, the attorney wants the arbitrators to draw inferences from the cross-examination, which the attorney will reiterate and argue in closing arguments; however, during cross-examination, the attorney must be careful not to ask the witness to agree with those inferences or conclusions.¹⁰⁷ The purpose of cross-examination, as stated above, is to “diminish the adverse impact of the witness’s testimony on your client’s

¹⁰⁰ *Id.* at 107-09.

¹⁰¹ HOBÉR & SUSSMAN, *supra* note 1, at 107. The attorney must consider, “Did the witness seem cooperative in giving the answer? Did the witness seem unsure or hesitant before answering, or hostile or combative? What did the witness’s tone of voice and facial expression and hand movement or movements suggest, and did any of them change from the witness’s previous answers?” *Id.*

¹⁰² *Id.* (stating, “. . . why did the witness say more than was necessary to answer the question? What did that ‘more’ contain, and can it be used to benefit your client’s case?”).

¹⁰³ *Id.* at 108.

¹⁰⁴ HOBÉR & SUSSMAN, *supra* note 1, at 108.

¹⁰⁵ *Id.* at 109.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 115.

case,” not to make an argument.¹⁰⁸ Veering away from facts and toward conclusions encourages the witness to narrate more and may result in testimony that does not progress the attorney’s objective.¹⁰⁹

The authors acknowledge that the temptation to ask for a conclusion can be overwhelming and difficult to avoid, especially when the witness agrees with a series of facts put forward by the attorney.¹¹⁰ As a practical example, the authors describe a scenario where the witness admits he wrote certain documents, “signed them, had read them before signing them, and understood and agreed with their contents.”¹¹¹ None of that, however, guarantees that the witness and the attorney will agree about what the documents mean, which would call for a conclusion.¹¹²

Asking for a conclusion usually falls under the umbrella of asking “one question too many.”¹¹³ The above example illustrates this principal, as the cross-examiner likely had an effective series of questions by getting the witness to admit to writing, reading, and signing the document. Asking for a conclusion is unnecessary and goes one question too far. The authors suggest that knowing when to stop begins with knowing what the attorney wants to achieve in the cross-examination – the final question that was prepared ahead of time – and stopping when the attorney has “scored a significant ‘hit.’”¹¹⁴

G. Basic Principle Seven: Do Not Let the Witness Repeat the Direct Testimony

Given the basic premise that cross-examination attempts to neutralize damaging portions of a witness’s direct testimony, it logically follows that a cross-examiner should not allow a witness to repeat direct testimony unless the attorney determines that it will advantage his or her client.¹¹⁵ The authors suggest that the most effect way to minimize the risk of a witness repeating his or her direct testimony is to use “short, simple, unambiguous leading questions limited to a single, simple fact [that] will call for simple

¹⁰⁸ *Id.* at 115.

¹⁰⁹ HOBÉR & SUSSMAN, *supra* note 1, at 116.

¹¹⁰ *Id.* at 117.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ HOBÉR & SUSSMAN, *supra* note 1, at 118 (as happens elsewhere in the book, the “one question too many” subsection is not strictly related the rest of the chapter, but may not have a logical home elsewhere). *See also* Gildin, *supra* note 94, at 496-97: “As a general rule, the cross-examiner will not ask the witness to admit a subjective conclusion. Rather, the cross-examiner will ask the witness to admit only a series of objective facts. Taken collectively, and in the order they are presented, the admitted facts will scream the subjective conclusion to the trier of fact. However, the cross-examiner never asks the witness what Irving Younger immortalized as the ‘one question too many’ – the conclusion that follows from the just-admitted facts.” *Id.*

¹¹⁴ HOBÉR & SUSSMAN, *supra* note 1, at 123.

¹¹⁵ *Id.* at 126.

answers and will tend to limit the witness's ability to repeat things from the direct testimony."¹¹⁶ The authors acknowledge, however, that repetitions may happen and, in such a case, recommend ignoring the repeated testimony and continuing with the line of questions.¹¹⁷

The most common occasion when an attorney may want the witness to repeat direct testimony is when the witness makes a statement that is inconsistent with a prior statement made by the witness.¹¹⁸ The authors note that surprising a witness with an inconsistent statement rarely happens in international arbitration, but understanding how to handle such a situation is worth exploring.¹¹⁹ For an inconsistency to be useful on cross-examination, it must make a discernible difference to the issues before the arbitrators, and it must be something that the witness will not be able to explain.¹²⁰ An effective cross-examiner can use an inconsistent statement for two possible purposes: to attack and destroy the witness's credibility or to imply that the arbitrators should take the prior inconsistent statement, and not the direct testimony, as the truth.¹²¹

H. Basic Principle Eight: Do Not Let the Witness Explain

The cross-examining attorney must maintain control of the witness at all times, which includes preventing the witness from explaining answers or asking questions.¹²² In some instances, a witness will attempt to explain an answer because the question is defective and cannot be answered with simply "yes" or "no," but in other instances, the witness will likely have an agenda.¹²³ When the attorney thinks the witness may have an agenda, an effective technique is to ask the witness, "Did you understand my question?"¹²⁴ If the witness answers affirmatively, the attorney can ask why the witness did not answer the question; if the witness responds that he or she did not understand the

¹¹⁶ *Id.* at 127.

¹¹⁷ *Id.* at 128.

¹¹⁸ *Id.* at 129.

¹¹⁹ HOBÉR & SUSSMAN, *supra* note 1, at 129.

¹²⁰ HOBÉR & SUSSMAN, *supra* note 1, at 130-31. A statement repeated from direct testimony should relate "to an issue central to the case" and "be difficult for the witness to find a credible way to evade it or to explain it away," with the ideal inconsistency being 180 degrees from the statement made on direct testimony. *Id.*

¹²¹ *Id.* at 131-32.

¹²² *Id.* at 137.

¹²³ *Id.* at 138-39.

¹²⁴ *Id.* at 139.

question, the attorney can ask a series of questions to achieve the same result, being careful to avoid the supposedly incomprehensible question.¹²⁵

Ultimately, the authors state that the attorney will not stop a witness from making a speech if the witness is determined to do so.¹²⁶ When a witness makes a speech, the attorney has some options: (1) the attorney can simply ignore the speech, (2) the attorney can use the speech as a springboard for further questions that will help the client's case, or (3) the attorney can repeat the question and ask the witness to answer it again.¹²⁷ The authors caution against inciting further speeches by attempting to reformulate the speech in the attorney's words.¹²⁸

*I. Basic Principle Nine: Exercise Self-control – Do Not Argue, or Get Angry, with the Witness*¹²⁹

The best cross-examiners will not only maintain control of the witness, but will practice self-control as well.¹³⁰ When the lawyer loses his or her composure, the witness gains freedom to say whatever he or she wants.¹³¹ In addition, the arbitrators will see the lawyer's loss of control, which damages the attorney's persuasiveness.¹³² Cross-examiners must always be careful not to argue with the witness or get angry with the witness.¹³³ The lawyer must "be perceived as trustworthy and credible if [he is] to do as

¹²⁵ HOBÉR & SUSSMAN, *supra* note 1, at 139-40.

¹²⁶ *Id.* at 141.

¹²⁷ *Id.* at 142-43.

¹²⁸ *Id.* at 144.

¹²⁹ To some extent, the nine principles build on each other, starting with the need for thorough preparation, progressing through the form of questions to ask, how to evaluate a witness's answer, and how to keep the witness from going off on a narrative. I find it surprising, therefore, that this principle would come last. Following the logical progression of the principles, why would the last bit of advice be about maintaining self-control when, arguably, this principle is most important of all? Perhaps a poorly worded question will lead to some unfortunate testimony, but a composed attorney can still potentially recover or argue around it during closing arguments. On the other hand, an attorney who loses all self-control may torpedo his case. Logically, I thought this should come far sooner, perhaps even first, to drive home the point that attorneys need to begin with themselves; they need to be in control of their emotions, and they need to know what they are doing. I do not think the authors would lose anything by making this the first principle, and following it with being fully prepared. Pinning this to the end of the book makes it seem more like an afterthought, which I think is a mistake.

¹³⁰ HOBÉR & SUSSMAN, *supra* note 1, at 146.

¹³¹ *Id.*

¹³² *Id.* at 147.

¹³³ *Id.* at 147-48.

good a job as you can for [his] client, and these behaviors contribute to – may even be essential for – [his] being perceived that way.”¹³⁴

V. PART IV – CONCLUSION

Cross-examination in International Arbitration focuses on the practical building blocks of effective cross-examination. Although the authors contextualize their principles in the setting of international arbitration, the principles are equally valid in domestic arbitration and even trial courts. The authors provide concrete advice and amply illustrate their principles with both real and hypothetical cross-examination exchanges. The authors effectively fleshed out their nine basic principles, including: (1) being fully prepared; (2) being brief; (3) using only leading questions; (4) using short, simple, and clear questions; (5) listening to the answer; (6) not asking for conclusions; (7) keeping the witness from repeating direct testimony; (8) preventing the witness from explaining answers; and (9) maintaining self-control.

As noted above, the authors, at times, included sub-sections within certain chapters that did not seem to fit, which can make the book seem cobbled together. However, the book has an overall feel of a collection of proverbs, which makes the misplaced sub-sections tolerable, despite the authors’ intent to organize it into basic principles. I found it more bothersome that the authors chose to tease out their advice into nine principles, where they probably could have collapsed some into a single principle. For instance, I did not think the authors needed to break apart the type of questions into two principles: leading questions and short and simple questions. However, again, that was only a minor issue and not something that impaired my ability, as a reader, to gain important and useful knowledge.

I also found it strange and disconnecting that some of the sample cross-examinations failed to fully illustrate the advice the authors were giving. In some instances, the authors even acknowledge that the illustration demonstrated one principle but violated others. Perhaps this, itself, is a useful lesson: that no cross-examination will be perfect but can still be effective. However, as a reader, I wanted the illustrations to give me a glimpse of *how* to do what the authors suggest I do, and when they fail to capture all but one or two principles, I am left wondering what a fully realized cross-examination looks like.

Beyond cross-examination, the book also provides an excellent framework for good lawyering, plain and simple. Principles such as being fully prepared, carefully listening to what the witness says, and maintaining self-control all extend outside the context of a cross-examination. A good lawyer will be prepared, will listen to his or her clients and adversaries, and will practice self-control and civility in a multitude of situations. With that in mind, the book becomes even more useful than the authors apparently intended, especially for law students and new lawyers. Even with the flaws I mentioned above, the book offers a treasure trove of excellent advice, all in a quick and easy read. I fully recommend this book for both law students, young attorneys, or even

¹³⁴ *Id.* at 152.

seasoned attorneys who want to freshen up their skills in the courtroom or arbitration proceeding.